No. 95-789

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP STANDARDS, DEPARTMENT OF INDUSTRIAL RELATIONS; COUNTY OF SONOMA,
Petitioners,
v.
DILLINGHAM CONSTRUCTION, N.A., INC.; MANUEL J. ARCEO dba SOUND SYSTEMS MEDIA,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 77 national and international unions with a total membership of approximately 13,000,000 working men and women, and the Building and Construction Trades Department of the AFL-CIO, representing more than 4,000,000 laborers and mechanics employed in the construction industry throughout the United States, file this brief *amici curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. The Employee Retirement Income Security Act's coverage provision, § 3(1), 29 U.S.C. 1002(1), brings within the statute a "plan, fund or program . . . for the purpose of providing . . . apprenticeship or other training programs." The Ninth Circuit determined that the program establishing the training and labor standards for apprentices is part of an "apprenticeship . . . program" and that this determination suffices to bring such programs within ERISA's coverage. The salient issue, however, actually is whether those training and labor standards are part of the "plan, fund or program" to *provide* an "apprenticeship . . . training program."

The language and structure of the ERISA coverage provision, when considered in light of the statutory objectives, the background against which Congress acted and the peculiar nature of apprenticeship programs as employee benefit programs, strongly suggest that ERISA was intended to cover *only* the fund, if any, created to defray the costs of apprenticeship training, and not the underlying complex of labor and training standards for running the program. The two sets of federal statutory policies in place before ERISA, one embodied in the Fitz-

gerald Act, 29 U.S.C. § 50, which provides for formal apprenticeship programs governing the labor and training standards of apprentices, and the other embodied in the Davis-Bacon Act, 40 U.S.C. § 276a(b), and § 302 of the Labor-Management Relations Act, 29 U.S.C. § 186, which govern the joint labor-management funds for financing such apprenticeship training programs, reflect and serve to perpetuate just such a basic distinction between "apprenticeship funding programs" and "apprenticeship training programs." That dichotomy in turn forms the basis of, and is carried forward in, ERISA by providing for coverage of the funding programs and not the underlying training programs. *Infra*, pp. 3-17.

II. On the above analysis, the question then becomes whether, under ERISA § 514(a), the California statute providing that registered apprentices can be paid less than the prevailing wage for fully-qualified journeypersons "relates to" the apprenticeship fund covered by ERISA. The prevailing wage statute does not in any way mention or address any aspect of the funding arrangement, and the statutes and regulations governing the standards for registration of apprentices do not do so either.

The only conceivable impact of the California prevailing wage law apprenticeship provision upon ERISA-covered apprenticeship funds is that the law creates a purely economic, indirect inducement to employers to establish apprenticeship training plans meeting registration standards, and such training programs may cost more than lower-quality, unregistered programs. Under this Court's opinion in *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, —— U.S. ——, 115 S. Ct. 1671 (1995) ("*Travelers*"), an indirect economic connection of this kind that "simply bears on the costs" faced by an ERISA plan is insufficient to trigger ERISA preemption. *Infra*, pp. 17-26.

Moreover, even if one were to entertain the Ninth Circuit's erroneous view and assume that ERISA covers apprenticeship training programs as well as apprentice-

ship funding programs, *Travelers* still indicates that there is not a sufficient relationship between the California prevailing wage law apprenticeship provision and apprenticeship plans to come within ERISA § 514(a) as construed in *Travelers*. *Infra*, pp. 26-30.

ARGUMENT

I. ERISA Preempts State Laws That Relate To Plans, Funds Or Programs For The Financing Of Apprenticeship Training Programs, And Not State Laws That Relate To The Underlying Training Programs Themselves.

A. ERISA § 514(a), 29 U.S.C. § 1144(a), provides that, with enumerated exceptions, ERISA preempts state laws "insofar as they may . . . relate to any employee benefit plan" within the statute's meaning. Thus, before determining whether a state law "relates to" an employee benefit plan, a court must determine what ERISA means by an "employee benefit plan."

The District Court and the Ninth Circuit did consider and pass upon this point in this case as a necessary part of their preemption analysis. Pet. App. 10-11, 32-33. But the pertinent statutory language—read in light of ERISA's object and policy—yields a quite different conclusion than that reached by the courts below.

As we demonstrate, an ERISA "employee benefit plan" regarding apprenticeship is the program for providing funding for an apprenticeship training program—which we will call, for convenience, the "apprenticeship funding program." It is *not*, as the Ninth Circuit presumed, the program for providing apprentices with the classroom and on-the-job training that enables them to become skilled journeypersons—which we will call, for convenience, the "apprenticeship training program." The distinction between these two programs is thus of great significance in applying ERISA's preemption provision.

B. We begin with the applicable statutory language. Under ERISA, there are two types of "employee benefit plans"—"employee pension benefit plans" and, of per-

tinence in the case of apprenticeship, "employee welfare benefit plans." ERISA § 3(3), 29 U.S.C. § 1002(3). ERISA § 3(1)(A), 29 U.S.C. § 1002(1)(A), defines an "employee welfare benefit plan" to include

> any *plan, fund or program* . . . established or maintained by an employer or by an employee organization, or by both . . . *for the purpose of providing for* its participants or their beneficiaries . . . [*inter alia*] . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, . . . vacation benefits, *apprenticeship or other training programs*, or day care centers, scholarship funds, or prepaid legal services . . . . [emphasis supplied]

The Ninth Circuit concluded, not surprisingly, that the program at issue in this case is "an 'apprenticeship or other training program' within the meaning of [§ 3(1)(A)]." Pet. App. 10. And then, on the basis of that conclusion standing alone, the court below reached its ultimate conclusion that the apprenticeship plan here viewed broadly is in all its facets a single, overall ERISA-covered "employee welfare benefit plan." Pet. App. 10-11.

But the complete coverage question is *not* what Congress meant by the phrase "apprenticeship or other training program." Rather, by the terms of the statute, it is what Congress meant by the phrase "[a] plan, fund or program . . . for the purpose of providing . . . [an] apprenticeship or other training program[]." The structure and wording of this complete phrase indicate that the drafters had in mind a system of two interrelated programs—the first of which "provides" for the second. Thus, on the face of the matter, the Ninth Circuit's conflation of the two programs into one does not appear to be a fair and accurate reading of all of the statutory words.

C. This Court's decision in *Massachusetts v. Morash*, 490 U.S. 107 (1989), makes clear that the language of the ERISA coverage provision cannot be considered in a vacuum in determining what constitutes a covered ERISA "plan, fund or program." The issue in *Morash*

was whether "a company's policy of paying its discharged employees for their unused vacation time constitutes an 'employee welfare benefit plan' within the meaning of § (3)(1)" of ERISA. *Id.* at 109.

The *Morash* Court acknowledged that "[t]he words 'any plan, fund, or program . . . maintained for the purpose of providing . . . vacation benefits' may surely be read to encompass any form of regular vacation payments to an employee." 490 U.S. at 114. The Court rejected that reading of the coverage provision, however, because "[i]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds." *Id.* at 115. Where the danger of mismanagement of accumulated funds is not present, the Court found it unlikely that Congress intended to subject employment-related programs to ERISA regulations. *Id.* at 115-16.[1]

The *Morash* Court recognized as well that the "States have traditionally regulated the payment of wages" and related aspects of compensation, and that including such compensation within the coverage of ERISA would displace state regulation in the area, with the result that "employees would actually receive less protection." 490 U.S. at 119. Where that would be the case, the Court concluded, courts should be "reluctant to so significantly interfere with the separate spheres of governmental authority preserved in our federalist system." *Id.* (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987)).

D. The Secretary of Labor has for similar reasons recognized in regulations interpreting the ERISA coverage

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[1] The *Morash* Court noted that "The reference[s] . . . in § 3(1) should be understood to include within the scope of ERISA those . . . benefit funds, analogous to other welfare benefits, in which either the employee's right to a benefit is contingent upon some future occurrence or the employee bears a risk different from his ordinary employment risk." 490 U.S. at 115-16.

provision that not all "apprenticeship or other training programs" are covered by ERISA. Under these regulations, ERISA does not cover employer on-the-job training "plans" or "programs" that provide that the employee undergoing the training will receive compensation akin to wages. *See* 29 C.F.R. § 2510.3-1(b)(3)(iv) (excluding "[p]ayment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training"). As the Secretary explained in proposing that exclusion, "[a]lthough section 3(1) of [ERISA] can be read to include job-skill training within the term 'welfare plan,' such training is virtually inseparable from an employee's normal duties for which compensation is paid, and therefore is not treated as an employee benefit plan." 40 Fed. Reg. 24,643 (1975). Although such employee training *could* be construed to fall within ERISA's coverage provision, because it involves a benefit provided to employees pursuant to what could be called a "program", these programs offer nothing for ERISA to regulate. Simply stated, the training plan involves neither the accumulation of funds nor the administration of accumulated funds.

The Secretary also has recognized in his regulations that, even where an apprenticeship *funding* program exists, apprenticeship is still unique among the ERISA "employee welfare benefit plan" class in its structure. In excepting "plans" to provide for apprenticeship from the ordinary ERISA reporting requirements, the Secretary explained:

> Apprenticeship plans do not have participants in the same sense as typical welfare plans. The journeymen in a trade with an apprenticeship plan do not receive training or any other direct benefit from the apprenticeship program. Their only interest is a general one of preserving existing trade skills and practices. Thus, the journeymen are not participants in the conventional sense. . . . The apprentices who do receive training are a much smaller group, which changes in composition continuously as new apprentices join and others either drop out or graduate to

> journeymen status. [40 Fed. Reg. 24642, 24647 (June 9, 1975), proposing 29 C.F.R. § 2520; *see also* 40 Fed. Reg. 34526, 34529-30 (August 15, 1975).]

In other words, apprenticeship plans (in their broad sense) do not involve "normal" participants since an employers' existing journeyperson employees, the contributors to the funding program, will not receive any apprenticeship training and have no right to receipt of apprenticeship fringe benefits on the occurrence of some contingency. Nor do apprenticeship plans involve "normal" beneficiaries since an apprentice may receive training without having been an employee participating in the plan or the beneficiary of a specific participant (such as an heir).

E. With *Morash's* lessons and the Secretary of Labor's apprenticeship regulations in mind, we turn to the background against which Congress legislated when it adopted ERISA in 1974. As we show, by that time Congress had long recognized the distinction between what we have labeled "apprenticeship funding programs" and "apprenticeship training programs." In fact, development of the distinction was in large part the *result of federal policy*.

(1.) *Apprenticeship training.* Federal involvement in promoting apprenticeship training programs began in 1934, when Executive Order No. 6750-C created the Federal Committee on Apprenticeship to work with representatives of labor, management and the states to set voluntary apprenticeship labor standards. Then, as a next step, the 1937 Congress adopted the Fitzgerald Act, 29 U.S.C. § 50, to provide express statutory authorization for such standard-setting work. H.R. Rep. No. 945, 75th Cong., 1st Sess. 2-3 (1937).

The Fitzgerald Act is entitled "An Act to enable the Department of Labor to formulate and promote the furtherance of *labor standards* necessary to safeguard the welfare of apprentices and to *cooperate* with the States in the promotion of such standards." 50 Stat. 664 (1937)

(emphasis supplied). The Act thus directs the Secretary of Labor to "formulate and promote the furtherance of *labor standards*" for apprenticeship and "to cooperate with State agencies engaged in the formulation of and promotion of *standards* of apprenticeship . . . ." 29 U.S.C. § 50 (emphasis supplied).

Among the first tasks for the Secretary of Labor's newly authorized federal Apprenticeship Unit was "to obtain state legislation enabling state departments of labor to develop apprentice labor policies and standards." U.S. Dept. of Labor, Manpower Administration, Handbook of Bureau of Apprenticeship and Training, sec. II, at 25 (1974) ("1974 Handbook"). The new federal agency developed and distributed a model state statute for this purpose (U.S. Dept. of Labor, Federal Committee on Apprenticeship, Suggested Language for a State Apprenticeship Law (1937), *reprinted in* 1 Grace Abbott, The Child and the State, 251 (1938)), and by 1974 more than half the states had adopted apprenticeship laws (1974 Handbook, sec. II, at 25).

Pursuant to the Fitzgerald Act, the Secretary of Labor also has promulgated regulations setting forth criteria for defining apprenticeable occupations and minimum standards governing apprenticeship training. The regulations, codified at 29 C.F.R. §§ 29.1-29.13, encourage the development by employers and labor organizations of apprenticeship training programs, and establish a procedure by which programs meeting minimum federal standards may be approved by the Bureau of Apprenticeship Training as eligible for federal assistance and certification and for other federal purposes. The federal regulations also enlist the states in the promotion of apprenticeship training by providing for the approval by the Secretary of Labor of state apprenticeship councils ("SACS") in states that have adopted apprenticeship laws and regulations meeting the federal minimum requirements. The regulations delegate to an approved SAC the responsibility for certifying local apprenticeship programs.

The Fitzgerald Act and its implementing regulations do not address how apprenticeship programs are financed or the manner in which such a financing scheme would be administered. Rather, that Act and those regulations require, as a condition of registration, that the apprenticeship program be conducted pursuant to "an organized, *written plan* embodying the terms and conditions of [the apprentice's] *employment, training, and supervision.*" 29 C.F.R. § 29.5(a) (emphasis supplied).

These written plans, submitted for approval to the federal government or an approved state apprenticeship council, embody the "apprenticeship training programs" in existence today. *See* 29 C.F.R. § 29.2(e) (defining an "apprenticeship *program*" as "a "*plan* containing all terms and conditions *for the qualification, recruitment, selection, employment and training of apprentices* . . . ." (emphasis supplied)); 8 Cal. Code Regs. § 205(e), (f) (defining an "apprenticeship program" as a "plan" covering such matters). These programs are administered by "apprenticeship committees" which are "established to conduct, operate, or administer, an apprenticeship program and enter into apprenticeship agreements with apprentices." 29 C.F.R. § 29.2(i). Under the Fitzgerald Act regulations, these committees may be "joint" (comprising an equal number of employer and union representatives) or "unilateral" (comprising only a "program sponsor"). *Id.*

(2.) *Apprenticeship Funding:* Congress first addressed in 1959 the separate issue of how apprenticeship training programs are funded. Because of the intermittent nature of employment in the construction industry, many fringe benefits are provided to union workers by jointly managed labor-management trust funds to which employers contribute. At first, "area-wide apprenticeship and training programs were financed by informal arrangements for contributions from either employers or a labor organization, or from both groups." U.S. Dept. of Labor, *JATC Handbook: A Guide to Joint Management-Labor Area-*

Wide Apprenticeship and Training Committees, 14 (1963). But it was only a matter of time before formal trust funds were set up to fund apprenticeship training programs as well. *Id.*

As is common in human affairs, this innovation raised a second generation of legal questions—in this instance questions concerning the legality of these joint trust funds under § 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186. *See, e.g.,* Comment, Payments to Joint Labor-Management Boards Under LMRA section 302, 10 Stan. L. Rev. 374 (1958). As the President of the AFL-CIO's Building Trades Department told Congress:

> The issue has arisen because of the language of section 302 of the Taft-Hartley Act. Subsections (a) and (b) of this section make it unlawful for an employer to pay, or any representative of employees . . . to receive any money or other thing of value. . . . Subsection (c)(5) of this section authorizes exceptions for joint trust funds but the purposes of such valid joint trust funds are limited to the specific items prescribed in such subsection. . . . Apprenticeship or other training programs are not included in the specification of valid purposes. . . .
>
> Certainly the Congress could not have intended to establish a policy of prohibiting employer contributions to joint trust funds for apprenticeship or other training programs. It is, indeed, the policy of the Federal Government to promote apprenticeship programs and particularly in the building and construction trades. [Hearings Before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, on Labor-Management Reform Legislation, 86th Cong., 1st Sess., Part 4, at 1733 (1959) (statement of Richard J. Gray, President, Building and Construction Trades Department, AFL-CIO).][2]

[2] Congress had already been advised that the "proper carrying out of the training functions of a joint apprenticeship committee requires funds for the payment of salaries of instructors and other costs of administration and instruction. These funds are provided in most instances by employer contributions to trust funds . . . ." Hearings Before the Subcommittee on Labor and Public Welfare, U.S. Senate, Hearings on Union Financial and Administrative Practices, 85th Cong. 2d Sess. 18 (1958) (hereinafter "1958 Hearings").

Secretary of Labor James P. Mitchell supported the call for an LMRA § 302 amendment to clarify the legality of jointly-administered training trust funds, stating that the Labor Department had been responsible for developing joint national training programs in all the major building trades, that "[f]or the most part, the funds necessary for carrying out these programs are provided by employer contributions to trust funds," and that "the cloud of illegality over employer contributions to these funds will handicap this important program." 1958 Hearings at 119-120 (Letter from Secretary of Labor James P. Mitchell).

The 1959 Congress responded by amending LMRA § 302(c) to make clear the legality of trust funds to finance apprenticeship training programs, *so long as certain standards are followed with respect to fund administration. See* Pub. L. No. 86-257, § 505, 73 Stat. 519, 537-38 (1959). This amendment took the form of an exception to LMRA § 302's general ban on the payment by an employer of anything of value to a representative of its employees, for "money . . . paid by any employer to a trust fund established by such representative for the purpose of . . . *defraying the costs of apprenticeship or other training programs*" so long as *inter alia,* "the detailed basis on which such payments are to be made *is specified in a written agreement*" and there are "provisions for an annual audit of the trust fund. . . ." 29 U.S.C. § 186(c)(6) (emphasis supplied).

Thus, labor-management apprenticeship *trust funds* were recognized and brought under a federal regulatory regime separate from the cooperative federal-state regime the Fitzgerald Act establishes for apprenticeship training programs (described *supra,* pp. 7-9). And, the concern

of § 302(c) is with the holding and managing of the trust fund moneys, not with the underlying program for training apprentices or with the separate apprenticeship committee that, under the Fitzgerald Act, establishes and administers that program.[3]

Six years later, the 1964 Congress amended the Davis-Bacon Act, which sets minimum wage rates for workers on most federal construction projects, to include certain fringe benefits within the definition of the "prevailing wage." *See* Pub. L. No. 88-349, § 1, 78 Stat. 238 (1964) (codified at 40 U.S.C. § 276a(b)). Among these benefits are contributions "irrevocably made by a contractor or subcontractor to a trustee or to a third person *pursuant to a fund, plan, or program . . . for defraying costs of apprenticeship or other similar programs.*" 40 U.S.C. § 276a(b) (emphasis supplied). The term "fund, plan, or program" in the Davis-Bacon Act amendment was derived from § 3(a) of the Welfare and Pension Plans Disclosure Act ("WPPDA") (Pub. L. No. 85-836, 72 Stat. 997 (1958)), the predecessor federal statute to ERISA with respect to the regulation of welfare and pension plans. *See* S. Rep. No. 963, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2339, 2344 (explaining derivation); *see also* 29 Fed. Reg. 13466 (Sept. 30, 1964) (adopting 29 C.F.R. § 5.27) ("The phrase 'fund, plan, or program' [in the Davis-Bacon Act] is merely intended to recognize the various types of arrangement commonly used to provide fringe benefits through employer contributions. The phrase is identical to language contained in section 3(1) of the [WPPDA].")[4]

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[3] Both LMRA § 302(c) and the Fitzgerald Act regulations refer to the requirement of a "written agreement." The § 302(c) agreement concerns the basis on which contributions will be made to a trust fund; the Fitzgerald Act agreement is between an apprentice and an apprenticeship committee. 29 C.F.R. § 29.2(j). Again, this distinction indicates that there are two statutory schemes each addressed to different aspects of apprenticeship.

[4] The WPPDA did not itself cover any aspect of apprenticeship.

(3.) *The Practice.* The creation of formal apprenticeship *funding* programs, *separate* from apprenticeship *training* programs, had become the norm by 1974, when ERISA was adopted, and this structure continues as standard practice today. The Bureau of Apprenticeship and Training encouraged this structure, advising apprenticeship committees that the use of training trust funds to defray the costs of a training program is lawful, of the purposes for which such funds may be used, and of standard trust fund agreements developed by national employer groups and labor organizations in the building trades. *See* U.S. Dept. of Labor, *JATC Handbook: A Guide to Joint Management-Labor Area-Wide Apprenticeship and Training Committees, supra*, at 14.

These forms developed on a national level have served as the model for local structures. Typical examples are the Local Apprenticeship and Training Standards for the Electrical Contracting Industry and the Electrical Joint Apprenticeship and Training Trust Fund Agreement, two standard forms prepared by the International Brotherhood of Electrical Workers and the National Electrical Contractors Association, which provide for a Joint Apprenticeship Committee to run the training program (selecting apprentices, supervising instruction, and insuring that labor standards are met) and for the formation of a funding program to defray the costs of training through a labor-management trust administered by trustees. Such a trust fund often provides financing to several separately registered apprenticeship programs, each governed by an apprenticeship committee whose members may or may not serve as trustees of the fund. This model is then carried through to the local collective bargaining agreements, which provide for the selection of an apprenticeship committee and, separately, for the creation of a training trust to be managed by trustees.[5]

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[5] Copies of the IBEW/NECA forms and of several local IBEW collective bargaining agreements are being separately lodged with the Clerk of the Court.

The adoption of ERISA has served to further cement this dual structure. For example, in Advisory Opinion Letter 81-21A, the Department of Labor responded to a request for advice from a joint training trust fund (the "trust") and a separate joint apprenticeship committee (the "committee") set up by a collective bargaining agreement between a local union and employers. Although this joint trust was funded by contributions from employers for apprenticeship training, the trustees then fulfilled their obligation by transferring the funds to the control of the committee. The Department's advice was that this practice violated ERISA § 403(a)'s requirement that benefit plan assets be held in trust by trustees. At the same time, the Department approved of a proposal to remedy the problem which left the Committee in place but "removed from the Committee all responsibility for the investment, handling, and use of the funds" and placed "[a]ll responsibility over financial matters . . . in the hands of the trustees of the Trust." Advisory Opinion Letter 81-21A, U.S. Dept. of Labor, Labor-Management Service Administration, February 9, 1981.

(4.) *The Upshot.* The background against which Congress legislated strongly suggests that Congress adopted the two-tier structure of referring to a "plan, fund or program . . . for the purpose of providing for . . . apprenticeship . . . training *programs,*" rather than simply a "plan, fund or program for the purpose of provding for *apprenticeship,*" to express its intent that the "plan, fund or program" covered by ERISA is the "apprenticeship funding program" that is the subject of LMRA § 302(c) and the Davis-Bacon Act amendments, and *not* the underlying "apprenticeship training program" that is the subject of the Fitzgerald Act.[6]

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[6] Congress could not, without drastically changing the structural parallelism of the ERISA coverage provision, have referred to a plan to "defray the costs of apprenticeship," as it did in the 1959 amendments to LMRA § 302 and in the 1964 amendments to the Davis-Bacon Act. An ERISA § 3(1) plan is one that "provid[es] for its participants or their beneficiaries" one of the listed schemes. "Defray the costs of apprenticeship" is not a noun, and would not fit into the list grammatically.

First, ERISA § 3(1)(A)'s two-tier syntax obviously embodies a considered choice of words, as *none* of the other listed schemes is described as a "program." Moreover, the words chosen employ the very same, repetitive syntax previously employed in the Davis-Bacon amendments, which refer to a "fund, plan or *program* . . . for defraying costs of apprenticeship or other similar *programs*" (emphasis supplied). In that context, it is clear, as discussed above, that the "fund, plan or program" encompasses funding mechanisms, while the second reference to "programs" encompasses the substance of the training and labor standards for apprentices.

Indeed, in the ERISA coverage provision, Congress as a general matter purposefully drew lines between (i) a "plan, fund or program" to provide one of the enumerated ERISA welfare benefit programs and (ii) the program provided, where that program does not involve the payment of financial benefits to individuals.

Thus, ERISA covers a "plan, fund or program" to provide for "daycare centers," and Congress surely did not intend to federalize the actual operations of daycare centers, such as the ratio of children to caregivers. ERISA also covers a "plan, fund or program" to provide for "prepaid legal services," and Congress surely did not intend to federalize the actual delivery of such services. In fact, ERISA's legislative history includes a colloquy explaining that states would retain their traditional role in licensing and disciplining attorneys. 3 Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, Legislative History of the Employee Retirement Income Security Act of 1974, at 4789-90 (Senators Taft and Javits).

ERISA § 3(1)(B) further provides that a plan providing "any benefit described in [LMRA § 302]" is covered by ERISA. And LMRA § 302(c)(6), as we have

seen, includes "a trust fund . . . established . . . for the purpose of defraying the costs of apprenticeship or other training programs." Again the reference is to the "apprenticeship *funding* program," not the "apprenticeship *training* program."

Second, the analysis in *Massachusetts v. Morash* of Congress' object in crafting ERISA's coverage provision reinforces what the statutory language read against its background so strongly suggests. By contrast to the "apprenticeship *funding* program," the matters properly understood to be part of the "apprenticeship training program" simply "present none of the risks that ERISA was intended to address." *Morash*, 490 U.S. at 115. The latter generates *no* concern with the "mismanagement of funds accumulated to finance employee benefits . . ." and *no* "contingency" that will determine whether participants receive benefits (as the participant journeyperson employees will not be receiving apprenticeship training). *Id.*

It is also to the point that—as was the case with the vacation pay at issue in *Morash*—the registration of apprenticeship *training* programs to ensure their ongoing integrity had long been the traditional province of the states when Congress enacted ERISA in 1974. Indeed, continued state involvement in this area was largely due to *federal* policy following the adoption of the Fitzgerald Act. That Congress *sub silentio* reversed nearly 40 years of federal apprenticeship policy, by which the states were enlisted to register and supervise "apprenticeship training programs" as part of an exercise of cooperative federalism—a policy that to our knowledge generated not a single complaint during the extensive hearings that preceded ERISA—is beyond reason.

Third, the distinction between "apprenticeship funding programs" and "apprenticeship training programs" also finds support in the Department of Labor's regulations, discussed above, interpreting ERISA's coverage provision to exclude "plans" or "programs" that provide for compensation to employees undergoing on-the-job training akin to wages. An employer could easily run an "apprenticeship training program," like any other training program, on an *ad hoc* basis, financing it from general assets. That apprenticeship often involves a separate apprenticeship funding program as well surely brings that *funding* program within ERISA's coverage. But the *training* program, consisting of on-the-job training with compensation paid for by the individual employer, and a curriculum of related classes, still contains nothing for ERISA to regulate. Nor does reading the ERISA coverage provision as directed to the funding program leave unaddressed any of the risks ERISA was intended to cabin. To the extent an apprenticeship committee actually becomes involved with financial matters, such as the making of spending decisions, committee members indubitably become ERISA fiduciaries, subject to the legal duties, and the enforcement provisions, created by ERISA. *See* ERISA § 3(21); 29 U.S.C. § 1002(21) (specifying who is a "fiduciary").

In sum, the obvious line to draw for ERISA coverage purposes between the "plan, fund, or program . . . for the purpose of providing for . . . apprenticeship . . . training programs" and what the "plan, fund or program" is providing was well developed by 1974, and fits not just the statutory language but also what the ERISA Congress intended to regulate and did *not* intend to regulate. As we have explained, that line is the one between the "apprenticeship funding program" which is covered by ERISA, and the "apprenticeship training program" which is not.

II. California's Prevailing Wage Law Does Not, Within The Meaning Of ERISA, "Relate To" A Plan, Fund Or Program For The Purpose Of Providing Apprenticeship Programs

A. That ERISA covers only apprenticeship funding programs, and not apprenticeship training programs, greatly simplifies but does not entirely decide this case. The question remains whether the state law here in question "relates to" ERISA-covered apprenticeship funding

programs within the meaning of the ERISA preemption provision, § 514(a), 29 U.S.C. § 1144(a).

California Labor Code § 1777.5 provides, *inter alia*, that registration of apprentices in state-approved apprenticeship programs authorizes employers performing public works contracts covered by the California prevailing wage law to pay such apprentices less than the "prevailing rate of per diem wages" otherwise required by that California law. On the other hand, apprentices not enrolled in programs approved by the State who are employed on state public works projects must be paid that "prevailing rate of per diem wages."[7]

The state approval of apprenticeship programs, in turn, depends upon meeting broadly stated "[a]pprenticeship program standards" (Cal. Code of Regs., Title 8, § 212 ("§ 212")), which generally track the federal "[s]tandards of apprenticeship" promulgated pursuant to the Fitzgerald Act (29 C.F.R. § 29.5). Both sets of standards treat *exclusively* with such matters going to the substance of apprenticeship training as the term of apprenticeship, the work processes taught on the job, the organized supplemental instruction offered, the manner in which apprentices' wages are set, evaluation of the apprentice's progress, the numeric ratio of apprentices to journeypersons consistent with adequate training as well as the qualifications of the individuals providing on-the-job supervision, the probationary period for apprentices, the adequacy of equipment and materials, the qualifications for enrollment as an apprentice, the contents of the written apprenticeship agreement, provision for discipline of

[7] Throughout this section, we term the provisions of Cal. Labor Code § 1777.5 establishing special provisions governing the wages paid to registered apprentices—that is, the first three paragraphs of § 1777.5—the "prevailing wage law apprenticeship provision," so as to distinguish those paragraphs from the remainder of § 1777.5, dealing with entirely separate apprenticeship-related requirements for public works contractors. Section 1777.5 does not directly set a wage for apprentices, but does so by reference to the "regulations of the craft or trade at which he or she is employed."

apprentices, and the awarding of certificates of completion to apprentices. *Id.* Those standards do not specify the means, method, or amount of financing of any aspect of the program, but do of course assume overall adequate financing to provide the various required components of apprenticeship training at an acceptable level.

B. (1) ERISA § 514(a), as we noted at the outset, provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a)." And, literally speaking, a state prevailing wage law that treats separately with wages to be paid registered apprentices can be said to "relate to" the apprenticeship training programs in which those apprentices are registered. At the next remove, such a state prevailing wage law can also be said to "relate to" the apprenticeship funding program, if any, that provides financial support for the apprenticeship training program, both because having a training program necessarily implies financing it, and because the applicable labor standards may have an impact on the amount of financing required.

To say that much is, most emphatically, *not* to say that § 514(a) is *properly* read so that this attenuated string of connections is sufficient to void a state law that on its face has nothing whatever to do with the funding of apprenticeship training programs. As the Court was at pains to remind us just last year "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminency, then for all practical purposes pre-emption would never run its course for '[r]eally, universally, relations stop nowhere.'" *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, —— U.S. ——, 115 S. Ct. 1671, 1677 (1995) ("*Travelers*"). Here, the gossamer thread of connection from (i) nonmandatory state minimum wage-setting for employers who voluntarily undertake state projects, to (ii) registered apprentice status, on into (iii) the apprenticeship training program underlying that registration, and then to (iv)

the funding program, if any, that finances certain aspects of that training program illustrates well that "really, universally, relations stop nowhere."

Travelers holds that in light of this indeterminancy and to give effect to the terms of limitations contained in § 514(a) itself, the term "relate to" cannot be applied with "uncritical literalism." 115 S. Ct. at 1677. And, as we now show, under the method of analysis *Travelers* mandates, it is clear the minimal relationship between the funding mechanism used to defray the costs of certain aspects of apprenticeship training programs and the California prevailing wage law apprenticeship provision is even weaker than the relationship held insufficient to trigger ERISA preemption in *Travelers*, and cannot support the preemption conclusion reached below.

(2) This Court has frequently observed, and *Travelers* reiterated, that in determining the preemptive effect of federal law, the ultimate touchstone is congressional intent. 115 S. Ct. at 1676-77. And, in ascertaining that intent, the Court begins "with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The California prevailing wage law apprenticeship provision, more obviously than the health care rate-setting statute at issue in *Travelers*, falls within not one but several areas of traditional state regulation that the Court must presume that Congress did not intend to pre-empt, including, among other areas, regulation of wages, of public works projects, and of apprenticeship.

For example, as the Court observed in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)

> "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, *minimum and other wage laws*, laws affecting occupational health and safety . . . are only a few examples." [*Id.* at 756 (quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976)) (emphasis supplied).]

The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects. *Lusardi Construction Co. v. Aubry*, 1 Cal. 4th 976, 985, 824 P.2d 643, 648 (1992) (citing *O.G. Sansone Co. v. Department of Transportation*, 55 Cal. App. 3d 434, 458 (1976)). Accordingly, the authority exercised by the State in setting a prevailing wage and then preserving its efficacy by carefully limiting any exceptions thereto—including most importantly, the exception recognizing apprenticeship wages—is an integral part of the statutory "police power to regulate the employment relationship."

Further, as this Court has had occasion to remark, the state's interest in making employment-related determinations affecting private employers is at its height with regard to state contractors, since the employees of such contractors "in a substantial if informal sense, [are] working for the [government]." *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 211 n.7 (1983). For that reason, long before ERISA was enacted, the Court in *Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903), upheld the Kansas Eight Hour Law, the precursor of modern state prevailing wage laws.[8]

The third area of traditional state regulation affected by the California prevailing wage law apprenticeship statute is, of course, the area of apprenticeship training standards. *See supra*, pp. 7-9. As to the setting of such apprenticeship standards and the registration of apprentices under those standards, moreover, the general presumption against preemption of areas of traditional state authority is augmented by the general admonition stated in ERISA itself that that statute is not to be "*con-*

[8] As the *Atkin* Court stated, "it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." 191 U.S. at 223.

strued to alter, amond, modify, invalidate, impair or supersede any law of the United States." § 514(d), 29 U.S.C. § 1144(d) (emphasis supplied). As a rule of construction, § 514(d) instructs that, given the role ascribed to the states in formulating and implementing apprenticeship training and labor standards under the Fitzgerald Act and its implementing regulations, any construction of the preemption provision should avoid disturbing those state activities.

It is also very much to the point that wages, state contracting practices and apprenticeship labor standards are all matters that, in their entirety, Congress chose *not* to regulate in ERISA, and chose to leave to the state processes in effect at the time ERISA was enacted. And, the California prevailing wage law apprenticeship provision embodies California's judgment on the proper treatment of these three non-ERISA-regulated matters and does so in a manner that does *not* address in any respect the scheme used for providing financial support to any aspect of an apprenticeship training program.

(3) At the same time, the logic of the situation suggests that the California prevailing wage law apprenticeship provision can have radiating, though indirect, effects on an ERISA funding program that supports an apprenticeship training program.

The limitation of a lower wage on prevailing wage jobs to *registered* apprentices does provide economic inducement to the subset of employers who work on such jobs to provide job opportunities for registered apprentices, rather than for apprentices not participating in a registered program.

That inducement, in turn, may lead such an employer to establish apprenticeship training programs meeting the registration standards (rather than simply hiring apprentices registered in training programs established by other employers, which is theoretically possible but may be difficult or undesirable).

And, an employer who, by reason of that inducement and other considerations, does choose to establish or support a registered apprentice training program may decide to participate in a multiemployer fund, covered by ERISA rather than to procede through an unfunded program not covered by ERISA.[9]

Finally, registered apprenticeship programs will normally entail higher costs than unregistered programs, since the point of the registration system is to assure quality training and fair treatment of apprentices. That means that ERISA apprenticeship funds that support registered apprenticeship training programs will normally require more in employer contributions than funds that support unregistered programs. That potential financial consequence of the California prevailing wage law apprenticeship provision comes as close to a traceable, albeit exceedingly indirect, effect on ERISA apprenticeship funds by reason of the California law as can be found.

Not only is that single potential economic effect attenuated but there is no suggestion that the statutory scheme was *designed* to influence apprenticeship fund decisions at all. Nor is there any aspect of prevailing wage law apprenticeship provision or the registration system upon which it depends that dictates to the fund trustees any particular expenditures in support of an apprenticeship training program, or controls the choices made by the trustees in determining how much money to raise, from whom to raise it, or how to disperse it.[10]

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[9] This choice is unlikely to be influenced by the need to meet registration standards in order to pay a lower apprenticeship wage; rather, it is the economic structure of industries such as construction, in which jobs with any one employer are temporary and in which employers typically band together to finance fringe benefits, that is the determinant.

[10] There is no federal or state requirement that any ERISA fund, as opposed to individual employers or some governmental entity, pay for the apprenticeship training required in registered programs, or that an ERISA fund that finances some aspects of an apprenticeship training program finance all aspects of it. Consequently, the registration requirements do not dictate any particular expenditure or category of expenditures by an ERISA fund.

As such, the state and federal apprentice training program registration system that underlies the California prevailing wage law apprenticeship provision bears the same entirely indirect, purely economic relationship to ERISA funds as a myriad of other state laws that also affect the cost of the services the ERISA fund supports—including, for example, statutes affecting the salaries that must be paid to administrators who are hired, laws affecting the cost of leasing or buying real property and equipment for use in the apprenticeship training program's educational effort, and health, safety and environmental laws that affect the cost of providing that training.

(4) This ephemeral, economic impact is analogous to, but much weaker than, the indirect economic impact held *insufficient* in *Travelers* to provide the basis for displacing state authority.

Travelers concerned a New York statute providing that patients were charged for the average cost of treating the patient's medical problem, and were then charged additionally depending upon the type of insurance, or other financial arrangements for providing medical coverage, that paid the patient's hospital bill. 115 S. Ct. at 1674.

The *Travelers* provision did not impose any legal requirement on the sponsors or fiduciaries of ERISA health benefit plans to take, or not to take, any particular actions. Rather, the only impact of the New York scheme on ERISA plans was economic: Under the scheme, ERISA plans faced a different set of economic possibilities and incentives than the plans would have faced in an unregulated or differently regulated market. 115 S. Ct. at 1679-80.

In particular, because of the New York regulation of hospital charges—which had the purpose of encouraging health care purchasers, and ERISA health plans in particular, to use state-favored health coverage systems—ERISA plan trustees faced higher costs for some kinds of financial coverage of inpatient hospital services provided

to ERISA plan beneficiaries than the trustees would have faced in a pure free market for hospital cost coverage. *See* 115 S. Ct. at 1674.[11]

The *Travelers* Court recognized that the scope of ERISA's preemption provision may include state laws other than those that deal specifically with the subject matter covered by ERISA. But laws operating as an indirect source of merely economic influence on the administrative decisions of ERISA plans "are a far cry from those 'conflicting directives' from which Congress meant to insulate ERISA plans" and, as *Travelers* holds, do not suffice to trigger preemption. 115 S. Ct. at 1680. *Travelers* stressed in this regard that the New York law did not

> preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishes to provide one. It simply bears on . . . costs . . . [T]o read the preemption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans . . . would effectively read the limiting language in § 514(a) out of the statute, a conclusion that would violate basic principles of statutory interpretation . . . . [115 S. Ct. at 1679].

So here: With or without the state regulation at issue, ERISA funds in California continue to be free to structure themselves in any manner they deem desirable within the confines of ERISA. The state law does not mandate that those funds be administered or structured in any

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[11] In *Travelers*, the Court held that the New York statutes "cannot be said to make 'reference to' ERISA plans in any manner" since "[t]he surcharges are imposed . . . regardless of whether the commercial coverage or membership . . . is ultimately secured by an ERISA plan." 115 S. Ct. at 1677. Similarly here, the California apprenticeship prevailing wage provision refers only to the registration system, which, as developed in Part I, *supra*, concerns only the non-ERISA covered apprenticeship training program, and applies without regard to whether that registered training program is financed through an ERISA funding program or otherwise. There is therefore no "reference to" any ERISA plan in the statute.

particular manner. Instead, the only effect the California law has on those funds "simply bears on costs"—in this instance the cost of the underlying apprenticeship training programs, in *Travelers* the cost of insurance and other health coverage. Since neither apprenticeship training programs (under the analysis presented in Part I, *supra*) or health coverage systems are themselves ERISA plans, that impact is "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." 115 S. Ct. at 1683.

C. On our view of the ERISA coverage of apprenticeship plans it is unnecessary to decide anything further. Even if one assumes, however, as did the Ninth Circuit, that ERISA covers the labor standards and training matters embodied in traditional apprenticeship training programs, *Travelers* still dictates the conclusion that there is no preemption under ERISA § 514(a).

First, as the Department of Labor regulations and opinion letters recognize, only a subset of apprenticeship training programs are paid for through a segregated fund, rather than as an aspect of non-ERISA covered day-to-day payroll practices. Therefore, at most only a subset of such apprenticeship training programs are covered by ERISA. *Cf.* 29 C.F.R. § 2510.3-1(b) (excluding from definition of "employee welfare benefit plan" programs which are funded through regular "payroll practices"); 29 C.F.R. § 2510.3-1(b)(3)(iv) (excluding compensation during time employee is engaged in training and performs little or no productive work); 20 C.F.R. § 2510.3-1(k) (excluding "[u]nfunded scholarship programs" including "tuition and education expense refund program[s], under which payments are made solely from the general assets of an employer or employee organization."); ERISA Advisory Opinion No. 94-14A (apprenticeship programs funded by general assets of an employer or employee organization not covered by ERISA).

Consequently, an implicit reference to registered apprenticeship plans is not a reference to, or a singling out

of, ERISA-covered plans particularly. And this is especially so since the matters covered by the registration standards concern those aspects of apprenticeship plans that are common to *all* of them, funded and non-funded, so that the reference to those standards is not short-hand for a reference to ERISA-covered plans.[12]

Second, on the Ninth Circuit's understanding of ERISA coverage for apprenticeship plans, the impact to be

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[12] This case thus raises no question concerning the consequences for ERISA preemption where a state statute does contain an express reference to an ERISA plan or plans. We note, however, that, despite broad statements in several of this Court's cases which, read in isolation, indicate that a specific reference to ERISA-covered plans automatically triggers preemption, in context those statements do not portend that a state law's mere mention of an ERISA plan dooms that law.

Rather, in every case, the point of the verbal reference to ERISA plans in the laws struck down was specially to *burden, prefer, or protect ERISA-covered plans*, rather than simply to treat the plans and their incidents as part of a larger category of entities having some common characteristics not implicating any ERISA concerns. *See District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 129 (1992), citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) and *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988) (after broad statement that a state statute "specifically refers to welfare benefits plans . . . and on that basis alone is preempted," going on to show that in the case before it and in the cases cited the preempted cause of action or liability is not one of general application but singles out ERISA plans for special treatment or is " 'premised on' " the existence of such a plan.)

Recognizing the contextual import of this Court's "reference to" statements, several lower courts have recently declined to strike down a state law on the purely verbal basis that the statute recognizes the existence of ERISA plans and says how they are to be treated, as part of a rule of more general application. *See Thiokol Corp., Morton Intern., Inc. v. Roberts*, 76 F.3d 751, 759 (6th Cir. 1996); *New York State Health Maintenance Org. Conference v. Curiale*, 64 F.3d 794, 799-801 (2d Cir. 1995); *New England Health Care Union, District 1199 v. Mount Sinai Hospital*, 65 F.3d 1024, 1032 (2d Cir. 1995). Indeed, those courts have noted that a "per se" test that preempts any state law that mentions ERISA plans would lead to absurd results. *See, e.g., Thiokol, supra*, 76 F.3d at 760.

assessed would be the impact of the California prevailing wage law apprenticeship provision not on the ERISA fund alone, but on the training and labor standard aspects of the apprenticeship training program as well. And, in making that assessment, the fair starting point is that the registered apprentice concept does depend upon participation in a plan meeting general programmatic training and labor standards.

But it is equally true that the California statute covers employers, *not* plans, and provides economic incentives but *no* mandate with respect to employer choices about the training and labor standard content of apprenticeship programs. And, it is true here, as a well-reasoned district court opinion points out in an analogous situation with respect to a tax statute that mentions ERISA-covered plans and has some impact on them, "not only is this effect incidental, but [it] is also unavoidable." *Thiokol Corp. v. Roberts*, 858 F. Supp. 674, 680 (W.D. Mich. 1994), *affirmed* 76 F.3d 751 (6th Cir. 1996).

There *are* apprenticeship training programs operating in California that are registered under the federal/state apprenticeship scheme established under the Fitzgerald Act. And, a state prevailing wage law that is *entirely neutral* with respect to the quality of the apprenticeship training programs that will trigger a lower apprentice wage *will necessarily affect* such registered programs. By permitting employers with unregistered programs to obtain the same discount without investing in a quality apprenticeship scheme, such a law would induce more employers not to register (or to deregister) their programs and to provide poorer training for apprentices. And, that alternative would sap the prevailing wage system as a whole, providing a wide loophole for employers seeking to pay some of their employees less than the prevailing wage in their craft without any need to demonstrate that those employees in fact are less skilled or are in training. Alternatively, a state prevailing wage law that *does not make any provision for a lower apprenticeship wage* would have

an even greater impact on apprenticeship plans, by making it extremely difficult, if not impossible, to provide opportunities for apprentices on prevailing wage projects.

In short, the *only* alternative open to the state that would have *no* economic impact upon apprenticeship programs would be the *elimination of the state's prevailing wage program on public works jobs entirely*. To suppose that Congress intended in enacting ERISA to preclude the states from acting in an area of traditional state regulation that, in itself, has nothing whatever to do with ERISA concerns simply because of the resulting need to accommodate by some means or other the impact on an ERISA-related area is to suppose that Congress created an ERISA-centric world—a world in which all ERISA plans must operate in an hermetically-sealed environment insulated from all state influence. The central thesis of *Travelers* is that Congress intended no such creation.

Consequently, the logical conclusion is that where it is the convergence of an ERISA-neutral state law and the existence in fact of ERISA plans that creates the relationship between the state law and the plans, the state's choice among the available ways of dealing with the fact of that convergence, any of which will have a comparable impact on ERISA plans, should *not* be considered a choice that "relates to" the ERISA plans within the meaning of ERISA.

Rather, where there is such an inherent relationship and such a necessary indirect economic impact—as there is in devising state and local tax laws, for example—it is that inherent relationship itself, and *not* the state law, that has an impact on ERISA plans.[13] Since nothing in ERISA suggests that Congress preferred one form of impact on

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[13] *See Boyle v. Anderson*, 68 F.3d 1093, 1103 (9th Cir. 1995); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 554-55 (6th Cir. 1987).

ERISA plans over another, none of the logically available choices should trigger ERISA § 514(a) premption.[14]

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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[14] In addition to the points made above, as California convincingly argues in its *certiorari* petition, striking down the state law here would impair the operation of the Fitzgerald Act and that Act's implementing regulations by making it impracticable to use apprentices on state public works projects and in that way undermining the Fitzgerald Act's cooperative federal-state apprenticeship scheme). The state law is therefore "saved" from preemption by ERISA § 514(d), 29 U.S.C. § 1144(d).

If the Court should reach this Savings Clause question, however, it should be mindful that this case presents *no* issue as to the *extent* to which state apprenticeship laws are saved by § 514(d). The plaintiff here is *not* complaining about any particular state requirement for the registration of apprenticeship training programs but only about California's refusal to allow plaintiff to pay workers a "subminimum" wage during the period *before* its application for approval of a training program was reviewed and granted. Pet. App. 5-6. That highly particularized Savings Clause issue turns on whether the cooperative federalism scheme established by the Fitzgerald Act and its regulations necessarily allows states to do more than simply mimic the very general Fitzgerald Act regulations in setting apprenticeship registration standards. And that is a complex issue in its own right that should be decided in a concrete, adversarial setting in which the question is actually presented by the case at hand.